

The Administrative Law Judge concluded the claimant suffered two separate accidents. The Administrative Law Judge determined the first accident occurred on June 6, 1997, and resulted in a temporary aggravation of claimant's left knee and a permanent injury to his right knee. The Administrative Law Judge determined the second accident occurred on February 1, 1999, and caused permanent injury to the claimant's left knee. Therefore, the Administrative Law Judge awarded a 31 percent functional

impairment to the claimant's right knee and a 20 percent functional impairment to the left knee.

At oral argument before the Board, the respondent raised the following issues for review: (1) whether medical evidence was obtained in violation of K.S.A. 44-510(c)(2); (2) whether the Administrative Law Judge ignored uncontradicted testimony as to a preexisting disability to both knees and the worsening of that disability over the years.

The claimant raised the issue of nature and extent of disability. Claimant contends that following his initial injury he became symptomatic in both knees and should be compensated based upon a permanent impairment to the body as a whole rather than two separate scheduled injuries. There is no claim for a work disability award in excess of the percentage of functional impairment.

FINDINGS OF FACT

Having reviewed the evidentiary record filed herein, and the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

The claimant was employed as a machine operator for respondent since 1978. On June 6, 1997, the claimant climbed on top of a machine to make an adjustment. When he completed that task he jumped down off the machine and immediately experienced severe pain in his right knee.

The claimant reported the injury and was sent to Occupational Health for medical treatment. The claimant was provided medication, light duty restrictions and referred for an MRI. The claimant returned to his regular job duties on July 21, 1997. After claimant returned to his regular job duties he continued to experience pain as well as swelling in his right knee. The claimant also began to experience pain in his left knee because he was favoring his right knee and placing most of his weight on the left leg.

The claimant advised his supervisor, Ken Forst, about his left knee pain and completed an employee's report of injury form on August 26, 1997, which detailed that because of the right knee injury the claimant was carrying his weight on the left leg which resulted in left knee pain.

The claimant was referred to Roger Hood, M.D. for treatment. On August 26, 1997, the claimant was examined by Dr. Hood who recommended a right knee replacement. Dr. Hood also noted the left knee was symptomatic due to claimant's limping and carrying most of his weight on his left side in order to protect the right knee. The claimant testified he discussed treatment of the left knee with Dr. Hood but was advised the right knee needed treatment first and then the left knee could be treated.

In October 1997, Dr. Hood performed a right total knee arthroplasty on claimant. For some time thereafter, the claimant either used a crutch, a walker or a cane to assist in walking. The claimant was released to light duty work in February 1998. The claimant testified he was on his feet quite a bit performing his light duty tasks of computer work and observing the machine work so he could offer advice. The claimant was released to his regular job duties in March 1998.

After the claimant returned to his regular job duties he continued to have pain and swelling in both knees. Although claimant had been released from treatment by Dr. Hood, the swelling in the right knee persisted and the claimant developed sharp pain including a popping sensation in his left knee. Because he was not scheduled to see Dr. Hood until a yearly check-up in November 1999, the claimant again approached his supervisor in February 1999 and requested treatment for his left knee.

The claimant testified it was his understanding that an incident report had to be filled out before he could receive medical treatment and so he and the supervisor just arbitrarily selected the February 1, 1999, as the date of accident. The claimant recalled prior occasions when he had felt a pop in his left knee as he came out of the pit by the machine he operated. The claimant testified the symptoms were the same that he had been experiencing for some time. The claimant was referred back to Dr. Hood and a left knee arthroplasty was discussed but no treatment was provided.

The claimant's medical history included arthroscopic surgery on his right knee in 1983, but he testified he never had further medical treatment on his right knee until the injury on June 6, 1997. The claimant also noted that no limitations were imposed and no impairment rating was given after that surgery and he remained physically active. The claimant further testified that following the surgery in 1983, he never again had symptoms which required treatment for his left knee until June 6, 1997.

The claimant's attorney referred him to Dr. Prostin on November 4, 1999, for examination and to determine the claimant's percentage of functional impairment. Following claimant's examination, the doctor opined claimant sustained a 50 percent permanent partial impairment to his right lower extremity and a 20 percent permanent partial impairment to his left lower extremity which combine for a 26 percent permanent partial impairment to the body as a whole. Dr. Prostin further opined the impairment was caused by the work-related incident on June 6, 1997. Lastly, Dr. Prostin concluded that following the healing period for the 1983 surgery to claimant's right knee there is no evidence of permanent impairment.

Dr. Hood performed the right total knee arthroplasty and opined claimant has a 25 percent permanent partial impairment of function to the right lower extremity. He further opined that 60 percent preexisted the June 6, 1997, accident based on the osteoarthritis revealed by the MRI prior to surgery. The doctor further opined the left knee was temporarily aggravated but claimant did not sustain any permanent impairment to the left

knee due to the June 6, 1997, accident. Dr. Hood conceded the Fourth Edition of the *AMA Guides* would provide a 37 percent impairment for a good result from a total knee replacement. However, the doctor disagreed with the *AMA Guides* and concluded the more appropriate rating was the 25 percent which complied with previous editions of the *AMA Guides*. Lastly, the doctor agreed that although work was not the cause of the osteoarthritis in the claimant's left knee, work aggravated the preexisting arthritic condition.

William A. Bailey, M.D., performed arthroscopic surgery on the claimant's right knee in 1983. The doctor had not seen the claimant since that time but in response to a letter from respondent's counsel noted the permanent partial impairment rating would have been 6 percent to the lower extremity.

The Administrative Law Judge ordered an independent medical examination of claimant with Dale E. Darnell, M.D. The doctor was asked to address the issues of the relationship of the left knee complaints to the June 6, 1997, accident and an impairment rating for the right knee. This instruction may have influenced the doctor not to rate or assign a percentage of permanent impairment to the left knee. Utilizing the Fourth Edition of the *AMA Guides*, the doctor opined the claimant had a 50 percent permanent partial impairment of the right knee which converts to a 20 percent permanent partial impairment to the whole body. The doctor concluded the stress placed on the left knee as the result of the right knee injury caused acceleration and aggravation of the preexisting condition of the left knee.

CONCLUSIONS OF LAW

Initially, the respondent contends the claimant obtained a functional impairment rating in violation of K.S.A. 1996 Supp. 44-510(c)(2) which provided:

Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of \$500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

The claimant's attorney referred claimant to Dr. Prostic for an examination pursuant to the foregoing statute. Dr. Prostic was not the authorized treating physician provided by respondent. The purpose of the examination was to provide a diagnosis of claimant's condition and to make recommendations for appropriate treatment. Dr. Prostic was specifically advised not to issue a disability rating. On September 7, 1999, the claimant was examined by Dr. Prostic. Dr. Prostic then issued a report which recommended

arthroscopic debridement of the left knee and consideration of high tibial osteotomy. The doctor imposed restrictions against prolonged standing, more than moderate walking, and against more than occasional climbing, squatting, or kneeling. The respondent reimbursed claimant's counsel the amount of \$441 for Dr. Prostic's examination on September 7, 1999, as unauthorized medical.

On November 4, 1999, Dr. Prostic performed a second examination of claimant for the purpose of providing an impairment rating. Dr. Prostic conducted a physical examination of claimant and obtained an x-ray of claimant's left knee. Following the second examination Dr. Prostic opined claimant had sustained a 50 percent permanent partial impairment to his right lower extremity at the knee and a 20 percent permanent partial impairment to his left lower extremity at the knee. The doctor combined the lower extremity ratings for a 26 percent permanent partial general body impairment. The charge for this examination including the x-ray was \$144 and was paid for by the claimant.

The respondent argues claimant obtained the second examination in an attempt to violate the intent and spirit of K.S.A. 1996 Supp. 44-510(c)(2) which prohibited the use of unauthorized medical to obtain a functional impairment rating.

Herein, the claimant did obtain a functional impairment rating from Dr. Prostic, but the rating was not paid for by the \$500 unauthorized medical allowance. Dr. Prostic performed a second examination, took an additional x-ray and provided a functional impairment rating. The claimant paid for this separate examination.

The Board has previously held that a claimant may use the unauthorized medical allowance to obtain an examination and thereafter obtain a functional impairment rating from that same examining physician so long as claimant pays for such a rating separately. The claimant can then choose whether or not to enter the functional impairment rating into the record and this would not violate the provisions of K.S.A. 1996 Supp. 44-510(c)(2). See *Castro v. IBP, Inc.*, ____ Kan. App.2d. ____, 30 P.3d 1033 (2001).

The Board concludes Dr. Prostic's opinion regarding the claimant's functional impairment rating was not obtained in violation of K.S.A. 1996 Supp. 44-510(c)(2) and is admissible in this proceeding.

The respondent next argues claimant had preexisting osteoarthritis in both knees. Accordingly, respondent contends the Administrative Law Judge erred by failing to deduct a sufficient percentage of preexisting impairment for the claimant's right knee and in failing to deduct any percentage of preexisting impairment for the claimant's left knee.

The controlling statute provides: "The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting." K.S.A. 1996 Supp. 44-501(c).

The Board has construed this statute to require proof that a ratable functional impairment preexisted the work-related accident. Conversely, it is not required that the functional impairment was actually given a rating before the work-related accident occurred nor is it required that the individual was given formal medical restrictions. But it is critical that the condition actually constituted an impairment in that it somehow limited the worker's abilities or activities. An unknown, asymptomatic condition that is neither disabling nor ratable under the *AMA Guides* cannot serve as a basis to reduce an award under the above statute.

A physician may appropriately assign a functional impairment rating for a preexisting condition that had not been rated. However, the physician should include a consideration of the claimant's contemporaneous medical records regarding the prior condition. The medical condition diagnosed in those records and the evidence of the claimant's subsequent activities and treatment should then be the basis of the impairment rating using the appropriate edition of the *AMA Guides*.

The claimant's uncontradicted testimony was that following arthroscopic surgery to his right knee in 1983, he continued an active physical lifestyle with no further problems with that knee. Moreover, he was neither provided restrictions nor an impairment rating following that surgery. The claimant further testified that thereafter he had no problems with his left knee until it became symptomatic following the injury to his right knee on June 6, 1997. The doctors testified claimant had osteoarthritis in both knees, but claimant testified his knees were neither symptomatic nor limiting on his abilities or activities until the June 6, 1997, accident.

The decision in *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P.3d 1184 (2001), is instructive as the facts are quite similar. In *Hanson*, the Court determined respondent had not met its burden to establish a preexisting functional impairment. The Court noted that K.S.A. 44-501(c) clearly distinguishes between a preexisting condition and a preexisting disability. The Court further noted there was no evidence of the amount of preexisting disability and there was some evidence that Hanson had no impairment because he had not sought treatment nor were his activities restricted after his initial injury to his knee. Moreover, in *Hanson*, the Court concluded respondent had not established any preexisting disability even though Dr. Janson attributed 95 percent of Hanson's ultimate impairment to his preexisting condition. Likewise in this case Dr. Hood has attributed 60 percent of his impairment rating to the right leg to claimant's preexisting condition.

In this case Dr. Prostic noted the records following the arthroscopic surgery on claimant's right knee in 1983 indicated claimant had full range of motion, good stability, no atrophy, no ligamentous injury, no meniscal injury and no joint space narrowing. The doctor concluded that with these findings his condition might not be ratable under the *AMA Guides*.

Dr. Bailey opined that if he had been asked to rate claimant following the surgery he performed in 1983, he would have rated the claimant with a 6 percent impairment to the knee or 3 percent whole body. But even though the doctor mentioned the *AMA Guides*, he never testified which edition he referred to in arriving at his rating.

The respondent has failed to establish the percentage of permanent impairment, if any, that was preexisting. Although Dr. Bailey had performed a prior surgery on claimant's right knee, he did not at that time assign a percentage of impairment or restrictions. When he did so 17 years later the doctor failed to indicate if the rating was pursuant to the Fourth Edition of the *AMA Guides*. The most persuasive evidence is the fact that claimant was physically active and symptom free in his right knee in the intervening time period until the work-related accident on June 6, 1997.

Lastly, the respondent argues the evidence establishes claimant sustained two separate scheduled injuries as determined by the Administrative Law Judge. The claimant had detailed a specific incident when he jumped off a machine on June 6, 1997, and injured his right knee. The claimant had also filled out a second employee's report of injury form detailing an incident on February 1, 1999, where he was exiting a pit and felt a pop in his left knee. The Administrative Law Judge concluded the claimant sustained two separate scheduled injuries.

The claimant testified that following the June 6, 1997, injury to his right knee he began to favor that leg and placed his weight on his left leg. The claimant developed pain in his left leg which he reported to his supervisor as well as his treating doctor in early August 1997. Following surgery the claimant was released to light duty work and he continued to experience swelling in his right knee as well as pain and swelling in his left knee. The claimant testified upon his release to full duty work in March 1998, he continued to experience pain and a popping sensation in his left knee.

Although the claimant subsequently filled out a separate accident report for a left knee injury on February 1, 1999, he testified his symptoms in his left knee had been ongoing for a long time and he only provided that date in order to receive treatment for his left knee.

Dr. Prostin opined following the injury to the right knee the claimant subsequently aggravated the underlying arthritis of the left knee. The court ordered independent medical examiner, Dr. Darnell, concluded the onset of left knee complaints were the result of the unusual stress placed upon the left knee as the result of the right knee injury which accelerated and aggravated the preexisting condition in the left knee. Lastly, Dr. Hood admitted that favoring the right leg had aggravated and made the left knee symptomatic.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.¹ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.²

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.³

Herein the claimant sustained a work-related injury to his right knee on June 6, 1997, and subsequently aggravated the preexisting degenerative arthritis in his left knee when he favored the right leg injury by placing more weight on the left leg. The claimant has established he aggravated the left knee as a direct and natural result of the right knee injury. The claimant has met his burden of proof to establish he sustained bilateral knee injuries as a result of his work-related accident on June 6, 1997. Accordingly, his compensation is based on a non-scheduled disability to the whole body.

Dr. Prostic and Dr. Darnell both concluded that as a result of the work-related accident on June 6, 1997, the claimant sustained a 50 percent permanent partial impairment to his right lower extremity. Dr. Prostic and Dr. Hood both concluded the claimant had a 20 percent permanent partial impairment to his left lower extremity although Dr. Hood disagreed regarding the causation of that percentage of impairment. Using the combined value charts in the *AMA Guides*, those lower extremity ratings convert to a 26 percent permanent partial whole body functional impairment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated January 3, 2001, is modified to reflect the claimant sustained a 26 percent permanent partial impairment of function to the whole body.

The claimant is entitled to 15.14 weeks temporary total disability at the rate of \$338 per week or \$5,117.32 followed by 107.86 weeks at \$338 per week or \$36,456.68 for a 26 percent permanent partial general bodily disability making a total award of \$41,574.

¹Odell v. Unified School District, 206 Kan. 752, 481 P.2d 974 (1971).

²Woodward v. Beech Aircraft Corp., 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

³Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

As of October 31, 2001, there would be due and owing to the claimant 15.14 weeks temporary total compensation at \$338 per week in the sum of \$5,117.32 plus 107.86 weeks permanent partial compensation at \$338 per week in the sum of \$36,456.68 for a total due, owing, and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this 31st day of October 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Derek Chappell, Attorney for Claimant
 J. Donald Lysaught Jr., Attorney for Respondent
 Brad E. Avery, Administrative Law Judge
 Philip S. Harness, Workers Compensation Director